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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellee, v. RENE GUADALUPE ORANTEZ, Appellant.	)	2 CA-CR 2008-0103 DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR-20063684

Honorable Richard Nichols, Judge

AFFIRMED

Terry Goddard, Arizona Attorney General
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Tucson
Attorneys for Appellee

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Tucson
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B R A M M E R, Judge.

¶1 Appellant Rene Orantez appeals his convictions on two counts of aggravated assault and one count of disorderly conduct. He asserts the trial court abused its discretion in denying his motion for a new trial and in admitting two photographs into evidence. We affirm.

Factual and Procedural Background

¶2 We view the facts in the light most favorable to sustaining Orantez's convictions. *See State v. Haight-Gyuro*, 218 Ariz. 356, ¶ 2, 186 P.3d 33, 34 (App. 2008). On September 11, 2006, Orantez's brother-in-law, D., and D.'s brother, L., went to Orantez's home to settle a dispute. D. challenged Orantez to a fight, but when Orantez went inside to "grab a weapon," D. and L. left for D.'s house. Shortly thereafter, while D. and L. were standing in the driveway of D.'s house, a man drove up in a vehicle D. previously had seen parked outside Orantez's home. Seeing Orantez in the passenger seat with the window rolled down, D. began to walk toward Orantez. Orantez revealed a gun and fired several shots at D. and L. D. saw a bullet hit a light pole ten feet away from him, saw two bullets hit the ground in front of him, and heard other bullets strike nearby. Hearing the gunshots, D.'s wife, R., ran outside and saw Orantez pull the gun back into the vehicle as it drove away.

¶3 A grand jury indicted Orantez on nine counts, including three counts of aggravated assault, one each for D., L., and R. After a two-day trial in June 2007, a jury found Orantez guilty of aggravated assault against D. and L. and of disorderly conduct, which had been offered as a lesser-included offense of the alleged aggravated assault of R. The trial court entered a judgment of acquittal on the remaining six charges. In

December 2007, Orantez filed a "Motion for Mistrial or for New Trial," which the court denied the following February. In March 2008, the court entered its judgment of conviction on the three offenses and sentenced Orantez to concurrent, presumptive terms of imprisonment, the longest for 7.5 years. This appeal followed.

Discussion

Motion for New Trial

¶4 Orantez first contends the trial court abused its discretion in denying his motion for a new trial. The state asserts that, because the court lacked jurisdiction to consider Orantez's motion in the first instance, we do not have jurisdiction over this issue. Jurisdiction can neither be waived nor conferred by agreement, and we have an independent duty to confirm that we have jurisdiction over an appeal before reaching the merits. *See State v. Avila*, 147 Ariz. 330, 333-34, 710 P.2d 440, 443-44 (1985). Because appellate jurisdiction is derivative, if the trial court lacked jurisdiction to consider a motion, we have no jurisdiction over an appeal from its decision on that motion. *See Ex parte Coone*, 67 Ariz. 299, 304, 195 P.2d 149, 152 (1948); *cf. Webb v. Charles*, 125 Ariz. 558, 560, 611 P.2d 562, 565 (App. 1980). The existence of jurisdiction is a question of law, which we review de novo. *See State v. Flores*, 218 Ariz. 407, ¶ 6, 188 P.3d 706, 709 (App. 2008).

¶5 A motion for new trial must be filed no later than ten days after the verdict. *See* Ariz. R. Crim. P. 24.1(b). As noted above, Orantez's "Motion for Mistrial or for New Trial" was filed six months after the jury had returned its verdicts. A trial court has no jurisdiction to consider a motion untimely filed pursuant to Rule 24.1. *See*, *e.g.*, *State v. McCrimmon*, 187

Ariz. 169, 172, 927 P.2d 1298, 1301 (1996); *State v. Hill*, 85 Ariz. 49, 53-54, 330 P.2d 1088, 1090-91 (1958) (refusing to consider untimely motion for new trial made under predecessor to Rule 24.1); *see also* Ariz. R. Crim. P. 24.1(b) cmt.

¶6 Orantez concedes that his motion was untimely and that the trial court, therefore, had no jurisdiction to consider it under Rule 24.1. Nonetheless, Orantez contends his motion should be viewed as a motion to vacate judgment pursuant to Rule 24.2. Although Orantez did not cite Rule 24.2 in his motion, he asked the court to "vacat[e] [its] judgment of guilt" because, he asserted, two of the state's witnesses had contacted his attorney after trial claiming they wanted to recant their trial testimony. *See* Ariz. R. Crim. P. 24.2(a)(2) (court may vacate judgment when "newly discovered material facts exist, under the standard of Rule 32.1[, Ariz. R. Crim. P.]"). But Rule 24.2(a) requires a defendant to file such a motion "no later than 60 days after the entry of judgment and sentence but before the defendant's appeal, if any, is perfected." Orantez filed his motion, and the court ruled on it, before the judgment of conviction and sentence had been entered. But, a defendant may not proceed under Rule 24.2 when a judgment of conviction and sentence has not yet been entered. *State v. Saenz*, 197 Ariz. 487, ¶ 6, 4 P.3d 1030, 1032 (App. 2000).[1] Our supreme court, moreover, has clearly stated that a trial court "d[oes] not have jurisdiction" to hear or consider a premature

[1]Orantez asserts in passing that any "reliance on *Saenz* is misplaced [because] the Court's discussion of Rule 24.2 was dicta." In fact, however, our discussion of Rule 24.2 in *Saenz* was a basis for our decision vacating the trial court's order granting a new trial. *See Saenz*, 197 Ariz. 487, ¶¶ 2, 6, 4 P.3d at 1031-32; *see also Phelps Dodge Corp. v. Ariz. Dep't of Water Res.*, 211 Ariz. 146, n.9, 118 P.3d 1110, 1116 n.9 (App. 2005) (defining "dicta").

motion to vacate the judgment under Rule 24.2. *State v. Hickle*, 129 Ariz. 330, 332, 631 P.2d 112, 114 (1981).

¶7 Relying on *State v. Hickle*, 133 Ariz. 234, 650 P.2d 1216 (1982) ("*Hickle II*"), Orantez asserts Rule 24.2 "makes no requirement that the Motion be made ***after*** judgment and sentence" and suggests that, although a trial court may not consider a premature motion before entering the judgment of conviction and sentence, it may consider the prematurely filed motion after it has entered judgment and imposed sentence. But *Hickle II* does not support Orantez's assertion. As noted above, the supreme court in *Hickle* concluded the trial court had lacked jurisdiction to consider the defendant's motion to vacate judgment when the defendant had filed, and the court had ruled on, the motion before the judgment of conviction had been entered. *Hickle*, 129 Ariz. at 332, 631 P.2d at 114. In *Hickle II*, the supreme court stated the defendant "was not foreclosed from relief" under Rule 24.2 and affirmed the trial court's decision on remand granting the defendant's motion to vacate the judgment. *Hickle II*, 133 Ariz. at 237, 239, 650 P.2d at 1219, 1221.

¶8 Contrary to Orantez's suggestion, however, the trial court in *Hickle* and *Hickle II* did not, after entering judgment of conviction and sentence on remand, then consider the defendant's premature motion. Rather, the defendant on remand had filed a new, timely motion to vacate judgment, which the trial court then considered. *Id.* at 237, 650 P.2d at 1219. Orantez neither cites, nor do we find, any authority suggesting a trial court may consider, after entering the judgment of conviction and sentence, a prematurely filed motion to vacate judgment, and we reject the suggestion. See *Hickle*, 129 Ariz. at 332, 631 P.2d at

114; *Saenz*, 197 Ariz. 487, ¶ 6, 4 P.3d at 1032; *see also Hickle II*, 133 Ariz. at 237, 650 P.2d at 1219; *cf. Smith v. Ariz. Citizens Clean Elections Comm'n*, 212 Ariz. 407, ¶ 37, 132 P.3d 1187, 1195 (2006) (consideration of prematurely filed documents disfavored; appeals court may exercise jurisdiction over prematurely filed appeal only if, when notice filed, "trial court ha[d] made its final decision," "no decision of the court could change," and "the only remaining task [wa]s merely ministerial").

¶9 A defendant is, however, free to file a new motion after the judgment of conviction and sentence have been entered and before the filing period prescribed by Rule 24.2 has expired. *See Hickle II*, 133 Ariz. at 237, 650 P.2d at 1219. Although Orantez, unlike the defendant in *Hickle* and *Hickle II*, cannot file a new motion to vacate judgment because the deadline for doing so has passed, *see* Ariz. R. Crim. P. 24.2, he is not precluded from raising the issues in a petition for post-conviction relief. *See* Ariz. R. Crim. P. 32.1(e) (grounds for relief include existence of "[n]ewly discovered material facts" that "probably would have changed the verdict or sentence");[2] Ariz. R. Crim. P. 32.2(b) (claims for relief based on Rule 32.1(e) not subject to preclusion under Rule 32.2(a)).

Admissibility of Photographs

¶10 Orantez argues the trial court abused its discretion in admitting over his objection two photographs of damage he caused to D.'s neighbor's house. We review a trial court's ruling on the admissibility of evidence for an abuse of discretion. *Haight-Gyuro*, 218 Ariz. 356, ¶ 7, 186 P.3d at 35.

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[2]We express no opinion that such a petition would provide relief.

¶11 Orantez first asserts there was insufficient foundation to admit the photographs. To lay foundation for the admission of photographs into evidence, a witness may "attest that the photographs accurately portray the scene or object depicted," *Lohmeier v. Hammer*, 214 Ariz. 57, ¶ 8, 148 P.3d 101, 105 (App. 2006), so that "the record contains sufficient evidence to support a jury finding that the offered evidence is what its proponent claims it to be." *State v. Lavers*, 168 Ariz. 376, 386, 814 P.2d 333, 343 (1991); *see* Ariz. R. Evid. 901(a), (b)(1). R. testified that, the day after the shooting, she had seen "places . . . [she] thought bullets had hit" her neighbor's house. She also stated that she was familiar with that side of her neighbor's house because she "usually water[ed] the tree that's right in that area," and that she had not noticed any damage to her neighbor's house before the shooting. R. affirmed the photographs "accurately represent[ed] the marks" she saw on the house the day after the shooting. This testimony provided sufficient foundation to admit the photographs. *See Lavers*, 168 Ariz. at 386, 814 P.2d at 343; *Lohmeier*, 214 Ariz. 57, ¶ 8, 148 P.3d at 105; *see also United States v. Stearns*, 550 F.2d 1167, 1171 (9th Cir. 1977) ("Even if direct testimony as to foundation matters is absent, however, the contents of a photograph itself, together with such other circumstantial or indirect evidence as bears upon the issue, may serve to explain and authenticate a photograph sufficiently to justify its admission into evidence."); *Haight-Gyuro*, 218 Ariz. 356, n.3, 186 P.3d at 36 n.3 (we may look to federal courts' interpretation of federal rules for guidance in interpreting our own).

¶12 Nonetheless, Orantez argues R. could not provide the necessary foundation for the photographs because her testimony "was not rationally based on personal knowledge" that

"the hole in the neighbor's house was caused by a bullet strike." He reasons that R. "had no training in damage caused by bullet strikes" and "was not outside when the shots were fired." But, the fact that R. could not definitively conclude the damage to her neighbor's house had been caused by bullets went to the weight of the evidence, not its admissibility. *See State v. Lacy*, 187 Ariz. 340, 349, 929 P.2d 1288, 1297 (1996) (lack of identification of shoeprint in photograph affects weight, not admissibility).

¶13 Orantez next contends the photographs were not relevant. Evidence is relevant if it has any tendency to make a material fact more or less probable. *Id*. at 349, 929 P.2d at 1297; *see* Ariz. R. Evid. 401. "Photographic evidence is relevant if it helps the jury understand any disputed issue." *State v. Stuard*, 176 Ariz. 589, 602, 863 P.2d 881, 894 (1993). D. testified Orantez had come to his home and fired at D. and L. He also testified that, although the bullets did not hit him, he heard them "hit something . . . on the right-hand side of where [his] house is." The photographs tended to show bullets may have hit and damaged D.'s neighbor's house, facts consistent with D.'s testimony. Thus, the photographs were relevant to corroborate D.'s testimony and establish that Orantez had fired at D. and L.

¶14 Last, Orantez insists the trial court's finding that the photographs were relevant was inconsistent with a previous ruling. Before R. testified, the state had first moved to admit the photographs while examining Pima County Sheriff's Department (PCSD) detective Charles Garcia. Although Garcia had testified the photographs were "fair and accurate representations of the defects" he had seen on D.'s neighbor's house, he was unable to testify when the damage had occurred. Orantez objected to admission of the photographs, arguing

they were irrelevant because the state had offered "no proof [the damage] w[a]s not there originally" or had any "connection to this case." The court sustained Orantez's objection. But, later that day, R. testified she had seen the damage to her neighbor's house the day after the shooting and that the house had not been damaged before the shooting—information that Garcia's testimony had lacked. The court's admission of the photographs based on R.'s testimony, therefore, was not inconsistent with its previous ruling.

Disposition

¶15 We affirm Orantez's convictions and sentences.

J. WILLIAM BRAMMER, JR., Judge

CONCURRING:

PETER J. ECKERSTROM, Presiding Judge

GARYE L. VÁSQUEZ, Judge